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In the

# Supreme Court of the United States

No. 769

CITY OF AMARILLO

*v.*

OLIVE COPELAND

## PETITION FOR WRIT OF CERTIORARI

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## PETITION FOR WRIT OF CERTIORARI

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*To the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your Petitioner, City of Amarillo, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, reported in 218 Fed. 2d 49. The jurisdiction of this Court is invoked because the Court of Appeals has decided an important state question in a way in conflict with state law and in doing so has failed to follow prior decisions of this court in deciding the federal question involved. The judgment sought to be reviewed was rendered on December 29, 1954, and entered on the same date. The order denying rehearing

was entered on February 2, 1955. This court has jurisdiction of this case by virtue of the provisions of Article 1254(1), United States Code Annotated.

## QUESTION PRESENTED

An intermediate state appellate court having held that a written instrument is a release, the Court of Appeals erred in disregarding the state court decision and holding that such an instrument was not a release.

## STATEMENT OF THE CASE

The City of Amarillo employed Dewey Copeland in its street maintenance department. While his crew was engaged in repairing a street, he was run down by an automobile driven by an admittedly drunk driver. Dewey Copeland was killed. Respondent, his widow, accepted five thousand dollars from the drunk driver's insurance carrier and executed a release, denominated a "covenant not to sue," provided in part (Record 147, et seq.)

> "It is further understood and agreed by and between the parties hereto that Mrs. Dewey Copeland does not by the execution of this instrument and/or the acceptance of the payment of Five Thousand Dollars ($5,000.00), release the City of Amarillo, a municipal corporation whose liability derives therefrom as a result of the death of her husband as described above. It is the intention of the parties that this instrument is not a release and is not a full payment nor satisfaction of all the damages sustained by her, and she, the said Mrs. Dewey A. Copeland, hereby fully, completely and in all respects reserves all rights

of every kind and character that she had against the City of Amarillo, a municipal corporation.

"It is further expressly understood and agreed that no promise or inducement has been offered Mrs. Dewey A. Copeland except the payment of the consideration herein expressed; that this instrument is executed and the covenants, warranties and agreements therein contained are entered into by the said Mrs. Dewey A. Copeland without reliance upon any statement or representation on the part of Cecil B. Kincaid, Ollie B. Kincaid, the Insurance Company of Texas, or any of their representatives, concerning the nature and extent of the damages or the legal liability therefor, and that the undersigned, Mrs. Dewey A. Copeland, enters into this agreement freely and of her own desire and volition.

"It is further understood and agreed by the parties hereto that neither the acceptance of this instrument nor the payment of the consideration expressed therein is to be considered as an admission of liability on the part of Cecil B. Kincaid, Ollie B. Kincaid or the Insurance Company of Texas, who expressly deny liability and enter into such contract and covenant to avoid the expense of further investigation and litigation.

"It is further understood and agreed that for the same consideration, Mrs. Dewey A. Copeland covenants and agrees to indemnify and hold harmless the said Cecil B. Kincaid, Ollie B. Kincaid, and The Insurance Company of Texas, for and from all further costs, expenses and payments arising as the result of the accident above described and Mrs. Dewey A. Copeland agrees to save harmless, reimburse and fully indemnify said parties for any and all legal liability arising therefrom, including every claim, demand or cause of action growing out of said accident asserted by virtue of the facts connected herewith, whether the same has or may hereafter be asserted by either Mrs.

> Dewey A. Copeland or any other persons, firm or corporation, or by the City of Amarillo, either by original proceedings, interventions, third party action, cross-action, or petition for contribution and/or indemnity, including all claims in any manner asserted or proceedings of any character, and agrees that Mrs. Dewey A. Copeland will pay off and discharge any judgment that may be obtained by any person, firm or corporation against Cecil B. Kincaid, Ollie B. Kincaid, and the Insurance Company of Texas on account of the accident referred to.
>
> "The said Mrs. Dewey A. Copeland consents and agrees and binds herself to plead this contract and release in a motion to discuss in the event a claim hereon is asserted against said parties and agrees to fully indemnify said parties for any and all expenses incurred, and should any judgment be rendered against said parties, either in her favor or any other person, firm or corporation, Mrs. Dewey A. Copeland consents and agrees that Cecil B. Kincaid, Ollie B. Kincaid and The Insurance Company of Texas, may cause, have or recover over and against her a like judgment to the end that they, and each of them, may be fully, and completely and in every respect indemnified."

A release with identical provisions and substantially the same in all material respects had previously been considered by the state appellate court in *Panhandle Gravel Co. v. Wilson*, and is set out in *248 S. W. 2d 783*. That release, also denominated "covenant not to sue," provided:

> "It is understood and agreed by and between the parties hereto that the plaintiff herein does not, by the execution of this instrument and the acceptance of the payment of $20,000.00, release the Panhandle Gravel Company, Inc., D. E. Basden or Fred E. Barger

herein from liability because of the matters and things set out in his petition herein, it being the intention of the parties that this instrument is not a release and is not a full payment and satisfaction of all damages sustained by him and all claims being asserted by plaintiff, and he is hereby fully, completely and in all respects reserving all rights of every kind or character that he has against the Panhandle Gravel Company, Inc., but in consideration of the payment to him of the sum of $20,000.00 as herein set forth, he covenants and agrees to hold harmless said D. E. Basden, Fred E. Barger and the Metropolitan Casualty Insurance Company of New York from any legal responsibility because thereof and as a result of his own injuries described in his petition herein by whomsoever such liability may be charged; and for and in consideration of the sum of $20,000.00 to him in hand paid by the Metropolitan Casualty Insurance Company of New York for and in its behalf and for and in behalf of D. E. Basden and Fred E. Barger, receipt of which is hereby acknowledged, the said C. W. Wilson does hereby bind himself, his heirs, executors and administrators to save and keep harmless and fully indemnify the said D. E. Basden, Fred E. Barger and the Metropolitan Casualty Insurance Company of New York against all and every claim, demand or cause of action growing out of said accident referred to in said suit or that has been asserted in said suit or that might or could be in said suit asserted by virtue of said accident and the facts connected therewith whether the same has or may hereafter be asserted by either the plaintiff or any other person, firm or corporation or by the Panhandle Gravel Company, Inc., * * * either by intervention or cross bill in said suit or by an original suit or proceedings of any character by * * * the Panhandle Gravel Company, Inc. * * * and agree that the said C. W. Wilson will pay off and discharge any judgment that may be obtained by any one or more of said persons, firms or corporations, against the said D. E. Basden, Fred

> E. Barger and the Metropolitan Casualty Insurance Company of New York on account of said accident to plaintiff and the facts out of which the accident grew and upon which suit is founded whether said judgment may be obtained in said suit or in any other suit or proceedings, it being the intention of the said C. W. Wilson to fully, completely and in every respect indemnify the said D. E. Basden, Fred E. Barger and the Metropolitan Casualty Insurance Company of New York absolutely and in all events against any future judgment or claim of any person or persons, firm or firms, corporation or corporations, whatsoever. The said C. W. Wilson consents and agrees and binds himself to plead this contract and release in a motion to dismiss his cause of action against D. E. Basden and Fred E. Barger, and that should any judgment in said cause or any other cause be rendered against the said D. E. Basden, Fred E. Barger or the Metropolitan Casualty Insurance Company of New York, either in favor of plaintiff or any other person, firm or corporation, that the said D. E. Basden, Fred E. Barger, and the Metropolitan Casualty Insurance Company of New York may in such suit cause or have and recover over and against the said C. W. Wilson a like judgment to the end that they, and each of them, may be fully, completely and in every respect indemnified."

Respondent then sued petitioner in the state district court in the Seventh Supreme Judicial District of Texas, but after the Court of Civil Appeals for the Seventh Supreme Judicial District held that the indemnity agreement constituted the instrument a release of all tort feasors, Respondent took a non-suit in the state court action, moved from the City of Amarillo to Carlsbad, New Mexico, and, claiming diversity of citizenship, instituted the same action in the United States District Court, Northern District of Texas, Amarillo Division.

## ARGUMENT

The first reason for granting a writ in this case is to correct the Court of Appeals' erroneous interpretation of the law of this state. The question before the Court of Appeals and the trial court was the effect to be given to a written instrument about which there was no allegation of uncertainty. The instrument had previously been considered and interpreted by the Court of Civil Appeals sitting at Amarillo, and that intermediate appellate court in unquivocal words stated that the instrument was a release; being a release of one tort feasor, it released the joint tort feasors. The Supreme Court of Texas refused to grant an application for a writ of error, making the docket notation "NRE." All this occurred in 1952 and the case had neither been distinguished nor modified at the time of the trial court's decision or at the time of the decision of the Court of Appeals. The trial court wrote no opinion, but informally expressed the attitude that the decision in the *Panhandle Gravel Company v. Wilson, 248 S. W. 2d 779*, was not correct. The Court of Appeals, faced with the decision, did not criticize it, but distinguished it upon nonexistent grounds. The fault of that court was called to its attention in the motion for rehearing, but to no avail.

The Court of Appeals took the position that the Wilson decision simply found that from the established facts in that case, as a matter of law the defendant (Panhandle Gravel Company) was entitled to indemnity from the truck driver (Basden and Barger), who had secured a release from the plaintiff (Wilson). The Court of Appeals has held

in the case at bar that the duty to indemnify is not shown. Neither in the case at bar nor in the *Wilson* case was the driver a party to the suit; neither in the case at bar nor in the Wilson case was the driver bound by the evidence adduced, by the facts established as a matter of law, or by the respective judgments. The Court of Appeals had disregarded the fact that without having the truck driver present, the Panhandle Gravel Company could not secure indemnity against the truck driver and the Court of Appeals has erred in interpreting the *Wilson* case to mean that it could secure indemnity. In the *Wilson* case, the Court of Civil Appeals stated (page 784):

> "Although the appellee designated this settlement agreement as a covenant not to sue, in effect it is a release."

and we respectfully submit that the Court of Appeals erred in holding that it was not a release.

The second reason for granting a writ in this case is to correct the Court of Appeals disregard of prior decisions of this Court. An argument on the merits of the Wilson decision was made in the state court by the attorneys for respondent who represented Wilson in that case. An argument on the merits of the Wilson decision is not appropriate in the federal tribunal because, right or wrong, the Texas law has been announced by an intermediate appellate court. If respondent's attorneys had prosecuted the *Copeland* case in the state court, the trial court and the Court of Civil Appeals would have been controlled by the *Wilson* case under the principles of stare decisis, but respondent

could have again presented the matter to the Supreme Court of Texas. Probably respondent's attorneys were not anxious to do this because of recent action of the Texas Supreme Court in refusing to grant their application for a writ of error in the *Wilson* case. Instead of attempting to secure a reversal of the decision in the *Wilson* case, respondent filed her suit in the United States District Court, which under the Rules and Decision Act, *28 U. S. C. A. 1652*, is required to follow the decision of the state court because of diversity.

The United States District Judge disregarded the Wilson decision and it is true that the interpretation of local law by federal trial judges experienced therein should be given great weight. The trial court's interpretation, however, cannot stand when opposed by an interpretation of a state appellate court. Chief Justice Hughes said in *Fidelity Trust Company v. Field, 311 U. S. 169:*

> "At the present time, the Thatcher and Travers cases stand as the only exposition of the law of the state with respect to the construction and effect of the statute of 1932, and the Circuit Court of Appeals was not at liberty to reject those decisions merely because it did not agree with their reasoning."

And the Chief Justice stated in *Six Companies of California v. Joint Highway District No. 10, 310 U. S. 180:*

> "We here have an announcement of the state law by the intermediate appellate court in California of a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the state is otherwise."

And Justice Stone said in *West v. American Tel. and Tel., 311 U. S. 223:*

> "Where an intermediate appellate court rests its considerate judgment upon the rule of law which it announces, that is datum for ascertaining state law which is not to be disregarded by the Federal Court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

The application of the Rules of Decision Act as announced on December 9, 1940, in the *Field* case, the *Six Companies* case and the *West* case has not been followed by the Court of Appeals because it has disregarded the decision in *Wilson v. Panhandle Gravel Company.*

The third reason for granting a writ in this case is to call into play this court's supervision of the Court of Appeals which has departed from the principles of *Erie v. Tompkins* to the extent that local questions are now decided one way by Texas appellate courts and another by the intermediate federal appellate court. In the case at bar the Court of Appeals has held that the instrument involved is not a release and the Amarillo Court of Civil Appeals has held in the *Wilson* case that such an instrument is a release. In *City of Lubbock v. Green, 201 Fed. 2d 146,* the Court of Appeals also disregarded decisions of Texas appellate courts, and Chief Justice Archer, writing for the Austin Court of Civil Appeals in *Kelley v. City of Austin, 268 S. W. 2d 773,* has recently stated:

> "Appellants cite City of Lubbock v. Green, 5 Cir. 1953, 201 Fed. 2d 146, as holding that reliance upon

the express instruction of a city attorney may estop a city from urging failure to give notice of claim as a defense in a personal injury case. This case does not discuss the Hallman case, the Phillips case, or the Davis case, and is in conflict therewith and also in conflict with Erie Railroad Company v. Thompkins, 304 U. S. 64; 58 Supreme Court 817; 82 Law. Ed. 1188."

## PRAYER

Your Petitioner prays that a writ of certiorari issue to the Court of Appeals, Fifth Circuit, commanding it to certify the proceedings had in No. 15125, City of Amarillo v. Olive Copeland to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States.

Respectfully submitted,

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In the

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15125

CITY OF AMARILLO,

*Appellant,*

*versus*

OLIVE COPELAND,

*Appellee.*

*Appeal from the United States District Court of the Northern District of Texas*

(December 29, 1954.)

Before HUTCHESON, Chief Judge, RIVES, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: Brought by the widow of Dewey Copeland, deceased, an employee in the Street Department of the City of Amarillo, the suit was for his wrongful death as a result of being run over, by an automobile driven by one Ollie Kincaid, while Copeland was about his regular work in repairing the streets and curbs.

The claim was that his death was due to and caused by defendant's negligence in failing in the particulars set out in the complaint to furnish him a safe place to work and particularly in not installing and maintaining suitable and sufficient barricades or barriers, and in failing to furnish and provide a flagman.

The defenses were: (1) that the driver of the automobile was in a state of intoxication which unfitted her to drive and that her acts of negligence were the sole proximate cause of plaintiff's injury; (2) that plaintiff was an experienced street laborer and assumed the known risks incident to the work, including the risk from which his death resulted, of being struck by a passing car; (3) unavoidable accident; (4) a denial that the defendant was negligent in the respects pleaded; (5) an affirmative plea that it had provided adequate and suitable barricades; and (6) that the injury and death were the result of the negligence of fellow servants of the deceased.

Instead of filing a third party complaint against Mrs. Ollie B. Kincaid, the driver of the car which caused the injury, and her husband, Cecil B. Kincaid, in which all questions arising out of the agreement of settlement[1] made between Mrs. Copeland, plaintiff in this suit, the two Kincaids, and the insurance carrier could be presented and determined, defendant undertook to take advantage of the settlement, by motion to dismiss the suit, on the ground

[1]In substance this agreement: (1) provided that in consideration of $5000 paid, Mrs. Copeland would not further prosecute a claim or demand against Mr. and Mrs. Kincaid or the insurance company or permit any other person, firm, or corporation to do so; (2) reciting, "It is the intention of the parties that this instrument is not a release and is not full payment or satisfaction of all the damage sustained by her, and she fully, completely, and in all respects reserves all rights of every kind and character that she had against the City of Amarillo," declared that it is not intended to, and it does not release the City; (3) further provided that it was not an admission of liability on the part of the Kincaid; (4) further provided that for the same consideration Mrs. Copeland agrees to indemnify and hold harmless the other parties to the agreement and to reimburse and fully indemnify them for any and all legal liability arising out of said accident whether the same may be asserted by Mrs. Copeland or any other person or by the City of Amarillo, and agrees *that Mrs. Copeland will pay off and discharge any judgment that may be obtained by any person, firm, or corporation against the other parties to* the in-

that the settlement with, and release of, the Kincaids was also a release of the city, and by motion to join the Kincaids and their insurance carrier as indispensable parties.

The evidence concluded, the cause was sent to the jury on a general charge which carefully submitted the issues raised by the evidence, and there was a verdict for plaintiff for $15,000, followed by a judgment for $7,500,[2] and defendant has appealed, assigning as error the failure and refusal of the court to direct a verdict for the defendant.

In support of this general claim of error, appellant advances three grounds, (1) that as matter of law the negligence of the drunken driver of the death car was the sole proximate cause of Copeland's death; (2) that Copeland was an experienced street employee, and that as matter of law he assumed the risk of being struck by a car while working in the streets; and (3) that the settlement appellee made with the driver of the car in and by which she agreed to indemnify her in the event the city should

strument; (5) further declared that Mrs. Copeland accepts and agrees and binds herself to plead this contract and release in a motion to dismiss in the event a claim herein is asserted against the other parties and agrees to fully indemnify said parties; finally it agreed that, for the same consideration, she transfers and assigns to the insurance company an interest in her cause of action against the city and any judgment obtained against the city in order to fully secure the covenants, agreements and warranties made.

[2]The judgment reciting, the verdict for $15,000, that the plaintiff had theretofore received $5000 and that in connection with the payment plaintiff had executed a covenant not to sue and retained her right of action against the city, that the verdict is subject to a credit of $5000 and further that plaintiff should recover only $7500 as against the city. It further found that all necessary parties were before the court. Finally reciting that the court being mindful that prospective litigation between the city and the Kincaids may present an issue of indemnity by the city in connection with the agreement of settlement which would bear on this judgment, it was ordered that any execution on the judgment should wait further orders of the court and any sum which may be paid in satisfaction of it should be held in the registry.

seek contribution or indemnity from her had the effect of releasing the city and preventing plaintiff from recovering from it, or if it did not have that effect it had the effect of offsetting the recovery by the same amount which, as a matter of law, under the undisputed facts, the city was entitled to recover as indemnity from the driver of the death car.

Pointing to the evidence showing the highly intoxicated state of the driver of the car, appellant insists that the City was not required to foresee or anticipate such an occurrence in violation of law, and, therefore, was under no duty to provide protection against such an injury, and could not be held accountable therefor.

Upon its second point, that plaintiff assumed the risk of being injured by working in the streets, defendant, citing many cases dealing with the doctrine of assumed risk, insists that by the nature of his occupation plaintiff's decedent was subjected to such a hazard as caused his death and under his contract of employment he assumed the risks thereof.

In support of its third point, appellant insists that the instrument of release and settlement between plaintiff and the Kincaids operated either as a release of the city as a joint tort feasor or had the effect of preventing circuity of action ascribed to a similar instrument in *Panhandle Gravel Company v. Wilson, 248 S. W. 2d 779.*

Appellee as stoutly insists: that the verdict of the jury has foreclosed all arguments on the question of negligence

and that the judgment was right and should be affirmed. So insisting, she urges upon us: that, under the evidence, the questions, whether plaintiff assumed the risk and whether the negligence of the driver was the sole proximate cause of the injury, were, at best for defendant, questions for the jury; that, upon evidence fully supporting its findings, the jury has found for plaintiff in effect that the city was negligent in not furnishing her decedent a safe place to work by furnishing proper barriers or other adequate warning; and that this was a proximate cause of the injury.

As to the release of the driver and the covenant to indemnify her in the event of a claim against her by the City of Amarillo, appellee insists that the instrument in question was not intended to be, and was not, a release of appellee's claim against the city but, on the contrary, it expressly provided that it would not be. So insisting, she urges upon us: that nothing in it or in any other circumstance or fact in the case operates to prevent the maintenance of the suit or the recovery of the judgment; that the court's action in reducing the judgment by one-half has given effect to the agreement not as a release in full but as a release pro tanto; and that *Gattegno v. The Parisian, 53 S. W. 2d 1005*, rather than the *Panhandle Gravel* case, supra, governs and controls here.

We find ourselves in complete agreement with appellee's contentions, (1) as to the sufficiency of the evidence to sustain the verdict, and (2) that it was not error to refuse to direct a verdict in the city's favor on either of the

grounds put forward by defendant. The law imposes,[3] and the city, by maintaining barriers or barricades until shortly before the accident occurred, recognized, a duty to exercise due care to protect from passing vehicular traffic employees compelled to work in and on the street. The undisputed evidence shows: that until shortly before the accident occurred a truck was so placed with reference to plaintiff's decedent as to constitute a barricade or barrier; that this truck was moved only a short time before the accident, and that if the truck had been there, the accident would almost certainly have not occurred.

There is, therefore, no basis whatever for the view that, as matter of law, the defendant was expected to work and assume not only the ordinary risk of working in a much traveled street where due care had been exercised by the city, but the risk flowing from and caused by the city's negligence. The questions of due care and assumed risk were for the jury, they were submitted to them under proper instructions, and the evidence amply sustains its finding.

Appellant's reliance on *Harbin v. City of Beaumont, 146 S. W. 2d 297*, will not at all do. It was expressly decided in that case, on the basis of settled law in Texas, that the city owed a duty of due care to a street worker to provide proper barricades or barriers. The statements in the opinion, on which appellant relies as to the nonforeseeability of the accident and the injury to a street worker, caused by

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[3]City of Denton v. White, 179 S. W. 2d 834; Harbin v. City of Beaumont, 146 S. W. 2d 297.

being hit by a driver whose vision was greatly defective, were not necessary to the decision of the case and were not made as a statement of Texas law. They were made in a discussion of inconsistent findings in a special verdict. To the extent that they are, or may be, relied on as stating the law of Texas upon the issue of proximate cause, they do not, in our opinion, correctly apply the stated principle. Besides, if the language in the case was not dicta and is to be regarded as a correct statement of Texas law as applied to the facts of that case, those facts are not in any sense the same as those here. For there, which is not the case here, the court found that the driver's "eyesight was so defective that on the undisputed evidence he could not have seen any sort of barricade, sign, or warning signal that appellee, in the exercise of ordinary care for the safety of Harbin, should have erected around the hole. Had appellee exercised every care charged against it by appellant by erecting the barricade, sign, or warning signal, yet, on the undisputed evidence, Lee would have driven over the hole just as he did."

Neither does appellant stand any better on its contention that the act of the drunken driver was the sole proximate cause of the injury. To claim that this is so is to deny what the evidence affirms, that, but for the defendant's negligence in not furnishing proper barriers and safeguards, plaintiff's decedent would in all reasonable probability not have been struck and killed. In short, the case is simply and solely a fact case for the jury, and the directed verdict was properly refused.

Finally, we are of the opinion that the district judge took the correct course in respect to the settlement. Of the evident opinion that the city, while as a matter of law entitled to contribution, might not be entitled to indemnity, he, in accordance with the *Gattegno* case, supra, awarded the city contribution by reducing the plaintiff's judgment one-half as the law of Texas requires,[4] and, by deferring execution and keeping control of the judgment as to the other one-half, he afforded the city an opportunity to obtain, if it could, a judgment of indemnity against the Kincaids. The different result arrived at and action taken in *Panhandle v. Wilson*, supra, was based upon, and only upon, the view of the court that, as matter of law, Panhandle Gravel Company was entitled to indemnity and that to avoid circuitous action, the indemnity would be afforded in the tort suit.

The judgment was right. It is AFFIRMED.

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[4]Cf. Wheeler v. Glazer, 137 Tex. 341; Austin v. Pope, 147 Tex. 430.